No. 355

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

W. O. BROWNE, E. W. NEGLEY, M. J. DOBSON, MERRILL NEWMAN, MORRIS J. NEWMAN, and BEN T. STOWELL,

Petitioners.

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Reply Brief for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

INTRODUCTION.

The Brief filed on behalf of the United States in opposition to the Brief of Petitioners in support of their Petition for the Writ of Certiorari does not meet or answer the points made by Petitioners in support of their prayer for the issuance of the writ. The first ten pages, practically, of the nineteen page brief for the govern-

ment, are devoted to a preliminary statement of procedural formalities and a five page statement of the facts.

The statement of the facts makes little or no distinction in the activities of the several petitioners, but makes blanket assertions of most general nature, doubtless calculated to put the situation before this Court in such manner as adversely to affect the particular points of law called to the attention of the Court in petitioners' brief. Realizing the impropriety of burdening this Court with petitioners' deductions from the entire record, petitioners confined themselves to a few indisputable facts which were necessary for the proper consideration of the purely legal points presented.

ARGUMENT.

I.

The government makes no attempt to answer petitioners' first point to the effect that the Court of Appeals erred in failing to consider and decide the substantial issues raised by petitioners. (Petitioners' Original Brief, Point I, p. 13). Petitioners argued that the Court of Appeals, as is clear from its opinion, based its decision on the belief that petitioners were guilty on the entire record. This action by the Court of Appeals, petitioners urged, was contrary to the decision of this Court, *Bollenbach* v. *United States,* 90 L. Ed. 318, in which this Court reminded Courts of Appeal that the question before them is not whether guilt may be deduced from the record of the trial proceedings, but whether or not the accused has been found guilty under "appropriate judicial guidance." Petitioners contend that this treatment of the appeal by the court below itself necessitates disapproval by this Court.

No answer to this point is made in the government's brief.

II.

In the argument under petitioners' Point II, (Petitioners' Original Brief, p. 15), petitioners urged that they should not have been indicted or convicted for conspiracy to violate the Securities Act, because, (1) when the sales in question were made, they were selling land in fee simple, and (2) at the time of such activities they did not and could not know that the sale of land, even

though coupled with a collateral oral representation that a test well would be drilled, constituted the sale of a security.

The government attempts to meet petitioners' position by assuming, for the purpose of argument, that petitioners' contentions as to the inapplicability of the Securities Act are correct. The government's answer in this connection presents a series of *non sequiturs* (Government's Brief, p. 11). It is argued that since the conspiracy charged was based on the use of the mails and not upon the use of other instrumentalities of interstate commerce, the jury would have had to find that the conspiracy contemplated (1) use of the mails, (2) fraud to which the use of the mails was related, and (3) sales of fraudulent securities by the use of the mails. Proof of a conspiracy to violate the Securities Act, the government contends, "thus involved proof of the identical elements required to establish a conspiracy to violate the mail fraud statute, with the addition of a third element, *i. e.*, proof of the contemplated sale of securities." It is, therefore, obvious, counsel for the United States urge, that in finding petitioners guilty on count 11, the jury "must have found that they were guity of consspiracy to violate the mail fraud statute."

In this argument the government neglects to observe that the count charging conspiracy to violate Section 17 (a) of the Securities Act accuses petitioners of a particular kind of a use of the mails, namely, a use *in connection with the sale of securities in which the employment of any device, scheme or artifice to defraud is manifest.*

The government's argument is, in effect, that because the conspiracy count charged the violation of two separate federal statutes, the general proof, even though the trial court instructed separately on the two stattutes, may

be "related" to that portion of the conspiracy count which charged conspiracy to violate the mail fraud statute —after the verdict of the jury.

The verdict of the jury, the judgment of conviction thereon, and the present contentions of counsel for the government, all combine to point the danger and the injustice to a citizen accused of crime of charging him in a single count with conspiracy—a charge difficult enough in itself to defend against—to violate several federal statutes. An accused is literally helpless before such an attack.

Further answering petitioners' point I, the government argues that under the authority of *S. E. C.* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344 the sale of land in the instant case was the sale of an "investment contract." No attempt is made to refute petitioners' point that the opinion in the *Joiner* case came out long after the last of the acts of the accused took place, and that not only were petitioners ignorant of the fact that the sales made by them would be regarded as the sale of securities, but no one knew, or could know, that the transactions contravened the Securities Act until the *Joiner* decision by this Court. As petitioners heretofore argued, even the Court of Appeals for the Fifth Circuit did not know, and did not believe, that the sale of oil leaseholds, coupled with collateral promises, "timed and contingent" upon the completion of a well, constituted the sale of an investment contract within the meaning of the Securities Act.

It is argued in the government's brief, that the burden of proof was sustained and that there was sufficient evidence from which the jury "could have concluded" that petitioners conspired to sell securities, and it is contended that, "since the statute is primarily directed against

fraud, *the intent that must be established is the intent to defraud.*" (Brief for U. S. p. 13). It is submitted that no general intent to defraud can take the place of the specific intent to violate a specific statute. *The intent to defraud must be an intent to defraud in the sale of securities.* The government argues that the question as to whether a security is involved, is a question of law for the court's determination, and that, even assuming that petitioners did not unequivocally understand that their activities involved the sale of securities, their convictions under count 11 were proper because "as a matter of law they sold securities." (Brief for U. S. p. 14). In the first place, the sale of oil leaseholds coupled with collateral promises timed and contingent upon a drilling of a well, was not determined to constitute the sale of a security until after the decision by this Court in the *Joiner* case. In the second place, this Court said in the *Joiner* case that whatever the form of the subject matter of the sale might be, the Securities Act may be invoked, "*if it be proved, as a matter of fact,* that they are widely offered or dealt in under terms or conditions of dealing which establish their character in commerce as an 'investment contract,' or as any interest or instrument commonly known as a 'security' ". Certainly this language of the Court cannot be intended to imply that the Supreme Court of the United States may determine, as a matter of fact, whether the instruments said to be securities are established in commerce as investment contracts, without proof upon the subject. If this be not so, then the question as to whether any sale comes within the mischief of the Securities Act may be left open to subsequent judicial determination after indictment, or even after conviction. When this Court said, "proved as a matter of fact", it did not mean "assumed" as a matter of fact. The estab-

lishment of "their character *in commerce*" cannot mean the establishment of their character by judicial opinion.

The very reason why this Court decided to review the *Joiner* case was to decide a question which needed answer by this Court, the answer not appearing in the language of the Act itself, according, at least, to the decision in the same case by the Circuit Court of Appeals for the Fifth Circuit.

In the brief for the United States (p. 14) the case of *United States* v. *Wurzbach,* 280 U. S. 396, 399 is cited and an excerpt given from the opinion by Mr. Justice Holmes. It is to be observed that the great judge said, "whenever the law draws a line there will be cases very near each other on opposite sides." In the case at bar, the statute drew no line. It remained for this Court to extend the known boundaries of the general term "securities," to include leaseholds coupled with timed and contingent collateral promises.

The brief for the United States makes no effort to meet or to distinguish *U. S.* v. *Wiltberger,* 5 Wheat. 76; *U. S.* v. *Harris,* 177 U. S. 305; or *Sarles* v. *U. S.* 152 U. S. 570 pertinently referred to upon this subject in petitioners' brief (pp. 23-24).

III.

The government's point 2 (p. 15), considering petitioners' point III (Original Brief p. 25), admits that it is difficult to reconcile the verdict which acquitted the principal promoter, Mansfield, on count I and found the other defendants guilty on the same count. In support of its position, the government cites *Dunn* v. *United States,* 284 U. S. 390. In the *Dunn* case a single defendant was indicted in three counts, on the second and third of which he was acquitted and on the first of which he was

convicted. The Court observed that the verdict was "not *necessarily* inconsistent." (p. 393). It must be noted that in the *Dunn* case only one defendant was involved and, there being three counts, each count was treated as a separate indictment. There was no such inconsistency or incongruity as is apparent in the case at bar. Here, Mansfield, the principal defendant, was indicted on the first count for a specific violation of the Mail Fraud Statute, consisting of the depositing of a certain letter in the mails. *In the same count—not in a different count —the other defendants were convicted even though they did not actually participate in the act of mailing.* The inconsistency appears in the verdict of the jury *on a single count.*

In addition to this incomprehensible result, the jury found Mansfield guilty on other counts where the proof was identical, except as to the particular letters mailed, and acquitted other defendants whose participation was no greater than appeared in the act of mailing the first count letter. Petitioners were found guilty of conspiracy to commit offenses described in the ten preceding substantive counts, each of which involved an act of mailing. Their only connection with the act of mailing was their alleged participation in the general scheme to defraud.

The Court's attention is respectfully directed to the dissenting opinion of Mr. Justice Butler in the *Dunn* case. No one can read his careful analysis of the decisions without being persuaded to the view that such an inconsistent verdict "assumes to cut a single and indivisible truth in two."

It is submitted that this Court should decide whether verdicts such as are involved in the instant application may be held to support judgments of conviction in federal courts.

IV.

In government's point 3 (Br. p. 16) it is argued that petitioners' contention going to the propriety of convictions for conspiracy and for the substantive offense where both are bottomed solely on proof of conspiratorial connection, are answered by the decision in *Pinkerton* v. *United States,* opinion rendered July 10, 1946 (90 L. Ed. 1212).

A careful reading of the opinion by Mr. Justice Douglas will disclose that instead of supporting the government in its contentions in this respect, it actually refutes the government's position. The majority opinion proceeds upon the theory that where there is a continuous conspiracy the partners thereto act for each other in carrying it forward, with the result that an overt act of one partner may be the act of all without any new agreement specifically directed to that act. Then the opinion goes on to say that "motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective." The following language of the opinion, however, discloses that, whatever may be the law as to other indictments, the rule announced in the *Pinkerton* case can have no application to the Mail Fraud Statute. Mr. Justice Douglas said,

> "A scheme to use the mails to defraud, which is joined in by more than one person, *is a conspiracy,* * * * yet all members are responsible, although only one did the mailing."

From this language the argument is attempted that, in a substantive mail fraud count a defendant is indicted for a single use of the mails in furtherance of a conspiracy; and in the conspiracy count *he is indicted for conspiring to commit the same overt acts which are com-*

mitted in furtherance of the same conspiracy already formed. It is believed that this Court will not indulge in such circular reasoning.

The dissenting opinion by Mr. Justice Rutledge in the *Pinkerton* case, with agreement in substance by Mr. Justice Frankfurter, reveals that under the majority opinion a man may be indicted and convicted under one separate indictment for committing a given offense, and, after he has been convicted and has begun serving his sentence, he may be indicted again and convicted upon the same evidence for conspiring to commit the offense for which he is being already punished. Even if this novel idea is to persist under indictments for offenses under the Internal Revenue Code, the same doctrine cannot be applied to offenses with reference to the use of the mails under the language of the Mail Fraud Statute as it is presently phrased.

In the brief for the government it is argued that proof of the substantive offense requires evidence of an actual mailing in execution of the scheme, an element not required to be proved to establish the conspiracy charge (p. 17). The argument, however, neglects to include the further requirement that evidence of the actual mailing to be charged against a particular defendant must be brought home to such defendant. It is inconceivable that a substantive offense requiring proof of a specific intent to commit the specific offense may be proved beyond reasonable doubt by proof of a general intent to conspire or to scheme to defraud. A moment's thought upon the subject should disclose the untenability of the reasoning in the government's brief. The language of the Mail Fraud Statute (Criminal Code Sec. 215; Title 18, Sec. 338 U. S. C. A.) is,

> "Whoever, *having devised* or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, * * * which, for the purpose of executing such scheme or artifice * * * place or cause to be placed, any letter, postal card * * * in any Post Office * * * or, authorized depository for mail matter * * * or shall *knowingly* cause to be delivered by mail according to the direction thereon * * * shall be fined * * * etc."

From this language it is plain that the scheme to defraud, or the intention to devise a scheme to defraud must precede the use of the mails which is charged as the offense. The use of the mails is in execution of the scheme or conspiracy already formed. After the government has proved the scheme, it then goes on to prove the act of mailing in execution of the unlawful plan. It is obvious that the scheme is not a scheme or conspiracy *to use the mails,* it is on the contrary, a scheme to defraud in which the use of the mails is invoked to carry out the designs of the schemers. Proof of *the scheme to defraud,* is not *proof of conspiracy to use the mails,* and yet it is that kind of proof upon which the government depends in the instant case to sustain both the conviction for the commission of the substantive offenses and for participation in the conspiracy.

The government makes no real attempt to answer petitioners' point V (Petitioners' Original Brief, p. 33). This point in petitioners' brief may be, and, indeed, should be taken into consideration in connection with point IV. In point V, the petitioners urged that proof of the commission of the substantive offense is not furnished by proof of the scheme itself, or of a so-called conspiracy to commit the same offense. As appears from the above reference to the Mail Fraud Statute, the crime as specified, is that the defendant "shall *knowingly* cause to be delivered by mail" a letter or other mail matter. The language, as has been said, imports an intention to

commit or to cause to be committed a sharply defined offense. The indictment in the instant case recognizes the statutory requirement, the offense being stated as follows:

> "And the defendants *so having devised* and intended to devise the aforesaid scheme and artifice, on or about August 19, 1941, in said District and Division and within the jurisdiction of this Court, *for the purpose of executing said scheme and artifice,* and attempting so to do, did *knowingly, wilfully,* fraudulently and feloniously cause to be delivered by mail a *certain letter and warranty deed, etc.*" (Italics supplied).

The decision of the Court below boldly erases as surplusage both the considered language of the statute and of the indictment.

A defendant does not commit two crimes by calling his same act by two names. As one highly respected Court of Appeals said, "We have repeatedly expressed our disapproval of accumulating sentences by verbal devices." (Petitioners' Original Brief, p. 35).

V.

The brief for the United States attempts to cover petitioners' points VI and VII in a comparatively few lines. Point VI in petitioners' brief is to the effect that the admission in evidence of a colored map of the area in question, in the absence of any evidence that petitioners had any contact with, or knowledge of such map, or of its use, on the ground that such exhibit might be considered by the jury in determining the intent of the defendants on trial, constituted prejudicial error. (Petitioners' Brief p. 37).

Point VII is to the effect that the instruction of the trial court that evidence relating to transactions between customers and strangers to the indictment with whom there was shown to be no connection on the part of the defendants, and of which transactions the defendants had no knowledge or connection, could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants, also constitutes prejudicial error. It would seem that the bare statement of these propositions demonstrates their validity.

The government argues that the transactions between one Kline, and one of the customers, Gunhild Benson, in which Kline showed to Benson a highly colored map, constituted evidence "from which the jury could reasonably have concluded that Kline, even though not named in the indictment was a party to the scheme to defraud, with the result that his acts in furtherance of and within the contemplation of the scheme were chargeable to all of the conspirators." (Government's Brief p. 18.) This assertion goes even further than the challenged instruction of the Trial Judge. Counsel for the government urge upon this Court that evidence between customers and a stranger to the indictment may be "assumed" by the jury to constitute proof against the defendants. This is nothing less than asserting that the jury may indulge in a presumption of guilt.

The government contends, also, that it is clear from the record "that the colored map was of such a character *that it could fairly be concluded* that its use was within the reasonable contemplation of the scheme." (Government's Brief p. 19). Here is another assumption and another presumption of guilt. Such so-called proof does not possess the virtue of circumstantial evidence indicating any guilt on the part of the defendants on trial.

The government then proceeds to argue that the challenged map was identical with the others except that certain areas were blocked off in color to show alleged holdings of different oil companies. (Government's Brief p. 19). The blocking off of areas in color to show holdings of oil companies on the map in question plainly converts the colored map into a totally different picture of the area than would be shown by a mere outline map such *as may have been* used by some of the defendants. Indeed, if the colored map was truly "identical" then why clutter the record with such accumulated documents, especially when the map in question was, so far as the record discloses, never even seen by any of the petitioners.

It is not only the Kline map but the Kline transactions to which petitioners object. If the prosecutor may call witnesses to testify to transactions with utter strangers, in the absence of any knowledge of such transactions by defendants standing trial for their liberty, then all barriers to conviction are down, and there is no limit to which the prosecutor may not go in procuring the conviction of men standing trial under the Mail Fraud Statute, the Securities Act or the Conspiracy Statute.

CONCLUSION.

The best reply which petitioners can make to the brief for the United States is to request the Court, after reading the government's brief, to re-read petitioners' opening brief. If this be done, it is believed, it will be apparent that no adequate answer has been made to the

points called to the attention of the Court as reasons why the writ of certiorari should be issued.

Respectfully submitted,

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